

# **Review of the Retirement Villages Act 1986**

## **Submission by Les Scobie, retirement village resident since 2007**

Before moving to examine the Victorian Retirement Villages Act 1986 it is important that all parties are aware of the following primary facts when it comes to Retirement Villages.

- 1. 72% of retirement villages are owned by 'for-profit' operators. The days of the 'benevolent' operator discounting the entry cost by the amount of the 'deferred fee' are well past.**
- 2. 74% of retirement village residents do not occupy their units on a freehold basis, merely granted a lease or licence to occupy.**
- 3. Retirees often pay a price commensurate with an outright purchase price for a similar unit within the general community without ever gaining ownership.**
- 4. Contractually residents have all the financial responsibilities of 'property ownership' like maintenance costs, renovation costs, selling costs, administration costs.**
- 5. Contractually in the order of only 1 in 2 residents have the financial rewards of 'property ownership' such as capital gain. Where granted however the retiree may not be entitled to 100% of any capital gain, it may be shared with the operator. The retiree also becomes proportionally responsible for any capital loss.**
- 6. Contractually residents can lose up to 45% of their in-going payment in a so named 'deferred fee' without ever gaining ownership.**

This from the "Review of the Retirement Villages Act 1986 – Proposed Legislative Changes 2004"

*"Possible negative consequences for residents and prospective residents are also increased because of the effects of age-related characteristics on their ability to make informed and knowledgeable decisions about retirement village services.*

*Secondary markets that respond to the complex information requirements of the retirement village market (solicitors, financial planners, accountants and the like) have not developed to a level which adequately responds to market need. Consequently, the the potential for consumer detriment is enhanced"*

Has anything really changed? From one who has lived in a retirement village for 13 years I can assure legislators and civil servants the answer is NO!

The following statement by [REDACTED], [REDACTED], [REDACTED], sums up the retirement village industry. It amplifies the financial impact on the capital base of both the occupants and subsequently their families.

**"Families need to be aware that what we are talking about here is the transfer of inter-generational wealth, not to families, but into the pockets of large multinationals.  
Shame about elderly people not having enough money for aged care"**

My submission to the Maintenance and Maintenance Charges aspects of the Retirement Villages Act -

Les Scobie.

**Review of the Retirement Villages Act 1986**  
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**The regulatory and policy framework (Part 2)**  
**Application and scope of the Retirement Villages Act 1986**

**Maintenance and maintenance charges**

**33. To what extent should the RV Act further address issues of 'responsibility' and 'timeliness' for repairs and maintenance in retirement villages? Response -**

The need for amendment to Section 38(1a) of the Retirement Villages Act 1986, lack of legislative protection for retirement village residents from a 'special levy' where a village operator fails to properly control the spending of the maintenance budget.

In Section 38.1 of the Retirement Villages Act 1986 a 'special levy' is defined as -

**RETIREMENT VILLAGES ACT 1986 - SECT 38**

*Increases in maintenance charges*

*(1) In this section—*

*"special levy" means a payment which is made by a resident to the owner or manager and which is not—*

*(a) **a maintenance charge**;*

Poor protection for residents comes from the lack of clarity in the words 'a maintenance charge' rather than say 'maintenance charges'.

Village operators hide behind this lack of clarity in the Act to enable careless, undisciplined or deliberate over spending of the maintenance budget, they then have the capacity of using a 'special levy' to support this spending. Whether this budget overrun has come about by design or by circumstance, the use of a 'special levy' in this way brings an increased financial burden upon already financially vulnerable retirees.

Operators claim the words 'a maintenance charge' means a special levy cannot be a category of a proposed maintenance budget as opposed to a special levy cannot be used for an overrun in maintenance charges. The legislation may in fact have been designed to produce this result but if so it contains a gross unfairness for financially vulnerable residents. It grants village operators a virtual 'blank cheque' spending environment despite the setting of a budget. Any legislative controls in Section 38 of the Act, Increases in Maintenance Charges beyond CPI, to protect residents are totally negated if the operator can come back at the end of the year and simply impose a 'special levy'.

In a modern retirement village contract operators insert the following example from an actual contract -

*Clause 23.2 - If the total Maintenance Charges (for any one Financial Year) collected from all the residents of the Village is insufficient to cover the operating costs for that Financial Year ("shortfall"), the Manager may impose a special levy to cover the cost of the shortfall under Section 38.6 of the Act.*

Section 38.6(b)(iii) then contains the following -

**RETIREMENT VILLAGES ACT 1986 - SECT 38**

*Increases in maintenance charges*

*(1) In this section—*

*(6) Despite anything to the contrary in a residence contract, a management contract or the by-laws, a resident is not required to pay a special levy unless—*

*6(b)(iii) the residence contract, the management contract or the by-laws provided that the residents are responsible for the expenditure or the class of expenditure which the special levy is intended to cover.*

**There is no room here to discuss the complexity of the pressures upon each and every village resident to support the imposition of a special levy, in effect simply rewarding an operator for careless, undisciplined or deliberate over spending.**

**ACTION REQUIRED - LEGISLATIVE AMENDMENT -**

**Section 38.1 to be strengthened -**

**FROM -**

***Increases in maintenance charges***

***(1) In this section—***

***"special levy" means a payment which is made by a resident to the owner or manager and which is not—***

***(a) a maintenance charge;***

**TO -**

***Increases in maintenance charges***

***(1) In this section—***

***"special levy" means a payment which is made by a resident to the owner or manager and which is not—***

***(a) maintenance charges;***

**34. What are the problems in more prescriptive requirements applying to all types of retirement villages and in all types of circumstances? Response -**

Need for amendment to Section 38(4) of the Retirement Villages Act 1986.

In the Act under Section 3 Definitions the voting rights of couples (not co-tenants) at an annual meeting are defined as having only one vote.

RETIREMENT VILLAGES ACT 1986 - SECT 3

Definitions

(2) If—

(a) under Part 6 a resident may vote at an annual meeting; and

(b) that resident and another resident or other residents are jointly entitled (whether as joint tenants or tenants in common) to share accommodation at a retirement village—

the right to vote conferred by that Part may be exercised by one only of those residents and, if those residents disagree as to which of them is to exercise the right to vote, the resident whose name appears first on the residence contract conferring the joint residence right may exercise the right to vote.

This provides protection for single retirement village residents in that their voting power on important matters is no less than a couple.

However when it comes to an increase in village fees beyond an increase in the rise of the Consumer Price Index, Section 38.4 of the Act allows a vote of couples to be double the voting power of a single resident.

RETIREMENT VILLAGES ACT 1986 - SECT 38 Increases in maintenance charges

(4) Subsection (2) does not apply if the payment of a maintenance charge that is greater than the adjusted maintenance charge has been approved by resolution of a majority of the **residents** at a **meeting** of the residents or is approved by resolution of the residents committee.

Section 38.4 either by design or default is allowing village operators to work around a protection afforded single residents by Part 2 of Section 3 of the Act the Definitions. The lived experience being operators present to the body of village residents Section 38.4 alone without Section 3. The words 'residents' and 'meeting' in their stand alone literal meaning can easily be interpreted as removing any voting power protection for single residents. The legislation may in fact be designed to produce this result but if so it contains a gross unfairness for single retirement village residents.

**ACTION REQUIRED - LEGISLATIVE AMENDMENT -**

**Section 38.4 to be strengthened -**

**FROM -**

**38.4 Subsection (2) does not apply if the payment of a maintenance charge that is greater than the adjusted maintenance charge has been approved by resolution of a majority of the residents at a meeting of the residents or is approved by resolution of the residents committee.**

**TO -**

**38.4 Subsection (2) does not apply if the payment of a maintenance charge that is greater than the adjusted maintenance charge has been approved by special resolution of a majority of the residences voting at an annual general meeting of the residents.**

It may be argued that the voting power of single residents are still protected by the definitions in Section 3 of the Act despite the wording of Section 38.4, that the use of the words 'residents' and 'meeting' in Section 38.4 are just a general reference. Clarity in the law however is just as desirable as clarity in any contract.

Single retirement village residents should have identical voting power to couples particularly on matters that have a negative financial impact upon them.

### **35. To what extent can or should the RV Act regulate what constitutes maintenance and capital items and to what extent should these issues be left to voluntary codes or guidelines?**

#### **Response -**

The NSW legislation contains the most comprehensive attempt to clarify capital items, the differences between maintenance and replacement. Victoria should adopt the provisions without hesitation.

#### ▸ **Division 2 Capital maintenance and replacement**

92 Interpretation

93 Obligations of operator with respect to certain capital maintenance or replacement

94 Obligations of residents with respect to capital maintenance or replacement

95 Resident may carry out urgent capital maintenance or replacement

96 Tribunal may make orders for capital maintenance and replacement

97 Funding of certain capital maintenance and capital replacement

98 Capital maintenance to be included in proposed annual budget

99 Capital works fund

100 Retirement village to be insured

101 Operator not to sell items of capital to residents

#### **Voluntary codes or guidelines.**

**The concept of voluntary codes or guidelines is untenable in an industry where 72% of operators are commercially driven by the making of a profit for distribution to parties other than the residents.**

The status of the two parties is clear, one is the property owner and the other is a mere tenant by way of a lease or licence to occupy. This despite the payment of an entry cost often commensurate with a 'purchase' cost for a similar property within the general community. The capacity of one party to exert power and influence over the other is also very clear.

The Consumer Affairs Victoria voluntary Good Practice Protocols are a failure because there are no penalties for failure to observe.

The Property Council Retirement Village Code of Practice will be a failure because there are no real penalties for failure to observe.

# *"Without a feared regulator, people with questionable ethics will push the line"*

*Fairfax Press*

A voluntary code of conduct or guidelines is no substitute for consumer protections under law. Only legislation and then regulators ready to enforce that law can truly protect retirees. An industry ombudsman is of the greatest need with fast, affordable, decisive enforcement of that law. Not even a not-for-profit operator has been a guarantee of ethical or lawful behaviour within the Victorian retirement living industry.

History has recorded self regulation as a fail and although we may self regulate with the best of intentions, the dark motivation to step over the line of morality and legality comes from a basic human weakness. A weakness to firstly protect or advantage oneself at the cost of another, and secondly in many cases a weakness to protect or advantage the organisation one serves at the cost of many. A voluntary code will last as long as the desire to advantage the resident is in the best interest of an individual operator, when the opposite is true the code will most assuredly fail.

Only the strength of the written law together with a ready and simple path to justice, such as an industry Ombudsman, will see the rights of residents truly protected and where necessary redressed. Anything else in my view is designed simply to divert the eyes of the legislator away from the need to actually legislate.

Submission by -

Les Scobie,

[REDACTED]

[REDACTED]